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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

THE SAN CARLOS APACHE TRIBE OF ARIZONA AND THE PAYSON COMMUNITY OF YAVAPAI APACHE INDIANS, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. SHOULD THIS COURT REVIEW THE DECISIONS OF THE NINTH CIRCUIT: THAT THE DISCLAIMER CLAUSES IN THE FEDERAL ENABLING ACT AND ARIZONA CONSTITUTION PROHIBIT ARIZONA FROM EXERCISING JURISDICTION OVER INDIAN TRIBES AND TRIBAL PROPERTY RIGHTS.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Treaty of July 1, 1852 with the Apache Nation. (See Appendix)

2. ARIZ. REV. STAT. ANN.
SS 45-231 (Repealed)
45-251
45-252
45-257
45-258 (Repealed)
(See Appendix)

STATEMENT OF THE CASE

The San Carlos Apache Tribe (referred to in conjunction with the Payson Community of Yavapai-Apache Indians below as "the Tribes"or "the Respondents") is a federally recognized Tribe of Indians organized pursuant to Section 16 of the Indian Reorganization Act of 1934. The Tribe is located upon the San Carlos Apache Indian Reservation in Gila, Pinal and Graham Counties, Arizona.

The Reservation consists of approximately two million acres within the boundaries of the State of Arizona and is within a much larger aboriginal territory occupied by the Tribe since time immemorial, encompassing millions of acres in the Southwest. The Reservation constitutes all or a substantial portion of the watersheds of the Black River, Salt River, San Carlos River, Eagle Creek, Deer Creek, Ash Creek, San Pedro River and the Gila River. All of the streams listed above, exclusive of the Gila River, are tributaries to the Gila.

The Payson Community of Yavapai-Apache Indians of Payson, Arizona, also known as the Tonto Apache Tribe, is a federally recognized Tribe of Indians organized pursuant to Section 16 of the Indian Reorganization Act of 1934. The

Tribe is located in Gila County, Arizona.

The Payson Community of Yavapai-Apache Indians' Reservation consists of approximately eighty-five acres within the boundaries of the State of Arizona. It is within a much larger aboriginal territory occupied by the Tribe since time immemorial, encompassing millions of acres in the Southwest. Although small, the Reservation constitutes a portion of both the Salt River and the Verde River watersheds. Both of these streams are tributaries to the Gila.

Other significant tributaries of the Gila include, without limitation, the Agua Fria River, New River, Hassayampa River, San Francisco River, San Simon River, Santa Cruz River, the San Pedro River and Skunk Creek.

It was the Respondents' position in the District Court and before the Ninth Circuit that as originally enacted over fifty years earlier, Arizona's water adjudication statutes A.R.S. §§45-231 et seq., provided for administrative, non-judicial determination of rights in stream systems. The quantification and adjudication of rights in the waters of a given stream were determined by the Arizona Land Department upon petition by any water user upon a stream. Under the administrative framework, claims that were not presented in a timely

fashion were forever void.

In early 1979, Arizona attempted service of process on the Tribes through registered mail, ordering the participation of the Tribes in the State's administrative adjudication of the Salt River system above Granite Reef Dam.[1]

On March 7, 1979 the Tribes filed Complaints in Federal District Court pursuant to 28 U.S.C. §1362 and other federal statutes, seeking declaratory judgment and permanent injunctive relief, naming as defendants the State of Arizona, the State Land Department of the State of Arizona, the Commissioner of the State Land Department of the State of Arizona (collectively the "State") and the Salt River Valley Water Users Association ("SRV"). The Tribes sought, inter alia, a declaration of the Tribes' immunity and injuctive protection from Arizona's pending effort to determine the water rights independently claimed by the Tribes and by the United States as reserved for the Tribes in the State proceeding.

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[1] On November 25, 1981 the Arizona Supreme Court consolidated the adjudications of the Salt and Verde rivers into the Gila River system adjudication. The balance of the tributaries have not been consolidated. The only attempted service of process has been on the Salt River above Granite Reef Dam.

The Complaints alleged that Arizona's attempt to assert subject matter and in personam jurisdiction directly over the Tribe and Tribal water rights, including federally reserved water rights, was invalid, and further alleged that the administrative action contemplated by Arizona statutes was unlawful.[2]

The Tribes' Complaints alleged that Arizona was barred from asserting jurisdiction over the Tribes due to the disclaimers embodied in the Federal Enabling Act, 36 Stat. 557 (1910) and Article XX of the Constitution of the State of Arizona, and was further barred by the sovereign immunity of the Tribes and other juridictional barriers discussed infra.

Petitioners SRV and the State, responding to the Tribes' Complaints, filed motions to dismiss pursuant to F.R.C.P. - 12(b)(1) (lack of jurisdiction) and 12(b)(6) (failure to state a claim). In support of their motions, both Petitioners argued

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[2] During the pendency of the Tribes' Complaints—some two months after commencement of the action—the Arizona State legislature enacted sweeping changes in the water adjudication statutes, including one requiring judicial quantification of water rights. The amended legislation also purported to "grandfather" any previously commenced administrative action before the State Land Department into a judicial action before the State Superior Court. The statute has been amended several times since.

that "considerations of wise judicial administration," outlined in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) ("Akin"), compelled the trial court to decline to assume subject matter and in personam jurisdiction in favor of the State proceedings.

The Tribes thereafter filed motions to strike the 12(b)(1) and 12(b)(6) motions of the State and SRV on the grounds that the Federal District Court clearly had jurisdiction, and that the Tribes' Complaints stated a claim upon which relief could be granted.

Oral argument on the motions to strike and motions to dismiss were heard on September 21, 1979. For purposes of argument the court consolidated the Tribes' original action with three removal actions brought by three other Arizona Indian Tribes (Civ. No. 79-182, 79-183, 79-184) and three other original federal actions brought by the Payson Yavapai-Apache Community (79-187), the Fort McDowell Mohave Apache Indian Community (79-267) and the Salt River Pima-Maricopa Community (79-185). The United States appeared as amicus curiae at oral argument.

During argument on the motions the Tribes stressed the responsibility of the court to make the specific factual investi-

gations necessary for a proper determination of the applicability of Akin.

In oral argument, counsel for the United States, appearing amicus, emphasized to the court the overwhelming Federal and Indian interest implicated by the pending State proceeding, since 95% of the area in the watershed of the Salt River above Granite Reef dam is Federal land or Indian reservations.

On January 18, 1980 in a single opinion and order which failed to distinguish between removal actions and cases originally filed in District Court or differing fact situations in the respective cases, Judge Cordova addressed the various motions in all seven cases and dismissed without prejudice the originally filed actions and granted the motions to remand the three removed actions to State Superior Court.

The District Court ruled that, pursuant to the McCarran Amendment, Arizona had jurisdiction over the Tribes and their property rights, enabling the state to determine Tribal water rights in the State proceeding. In so ruling, the court determined that the "central question" was "whether dismissal is warranted, where proper, in light of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" See Pet. App. E-5.

The Tribes timely filed their Notices of Appeal on February 19, 1980 of the Judgment entered on January 25, 1980. As a result of those appeals, the Ninth Circuit rendered the opinion reversing the District Court and remanding the case on certain issues. San Carlos Apache Tribe v. Arizona, 668, F.2d, 1093 (9th Cir. 1982)[3]

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[3] For convenience, the Ninth Circuit's decisions, San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982), and Northern Cheyenne Tribe v. Adsit, 668 F.2d1080 (9th Cir. 1982) shall be cited to as they are printed in the Appendix to the Petition for a Writ of Certiorari, and will be referred to herein as "San Carlos", "Navajo" and "Adsit".

REASONS FOR DENYING THE WRIT

I. GENERAL RESPONSE TO QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

Petitioners have presented to this Court two questions for review. They are:

> I. DO THE DISCLAIMERS IN ARIZONA'S ENABLING ACT AND CONSTITUTION DEPRIVE ITS STATE COURTS OF JURISDICTION TO ADJUDICATE WATER RIGHTS CLAIMED BY THE UNITED STATES FOR INDIAN TRIBES, NOTWITHSTANDING THE McCARRAN AMENDMENT AND THIS COURT'S HOLDING IN COLORADO RIVER WATER CONSERVATION DISTRICT V. UNITED STATES?
>
> II. DID THE ARIZONA DISTRICT COURT CORRECTLY DETERMINE THAT CONSIDERATIONS OF WISE JUDICIAL ADMINISTRATION REQUIRE ADJUDICIATION OF ALL CONFLICTING WATER RIGHTS IN A COMPREHENSIVE STATE GENERAL ADJUDICATION, RATHER THAN THROUGH PIECEMEAL FEDERAL ACTIONS?

These "questions" are not the issues decided below. The posture of the case in the trial court and those issues presented for review in the Ninth Circuit only collaterally include the

Question I, which Petitioners now pose as a primary issue. In both the trial court and the Court of Appeals, the threshold question always was whether the State of Arizona had jurisdiction to adjudicate and regulate the water rights claimed by or on behalf of a federally recognized Indian Tribe located on a federally recognized Indian reservation.

In San Carlos, the Ninth Circuit set forth the "Issues on Appeal".

1. Does the federal Enabling Act authorizing Arizona's admission to the Union, and the state's disclaimer clause in its constitution prohibit Arizona from exercising jurisdiction over Indian tribes?

2. Even if the Arizona courts had jurisdiction, did the district court improperly apply the doctrine of "wise judicial administration" in dismissing the case?

The actions in the trial court which resulted in the Petition to this Court were intitiated by the fact that Petitioner, SRV attempted to directly subject the respondent Indian Tribes to the jurisdiction of the State of Arizona. SRV initiated an administrative proceeding in the State Land Department to determine the water rights claimed by those Tribes for their reservations. The Tribes then filed a series of legal actions in Federal District Court to contest both the propriety of SRV's

conduct and the integrity of the proceedings and of the jurisdictional claims made by the State of Arizona which both Petitioners urged were sufficient to directly subjugate the Tribes and their water rights to the jurisdiction of the State in the administrative proceeding.

In their Responsive Brief on Appeal, and then only indirectly, Petitioners SRV and the State of Arizona suggested that it would be sufficient to adjudicate the water rights claimed by the United States on behalf of Indian Tribes. This was an effort to avoid the arguments raised by the Tribes and which remain undecided by the Ninth Circuit.

The Respondent Tribes urged the Ninth Circuit to disregard the Petitioners' position in that it was divergent from the position Petitioners had urged to the trial court. Petitioners should be bound by their efforts to directly subjugate the respondent Tribes and the water rights claimed by the Tribes for their reservations, and should be bound by their arguments to the trial court below that the jurisdiction of the State did, in fact, extend to direct jurisdiction over the Tribes and water rights claimed by the Tribes. They should not attempt to divert this Court's attention to an issue raised only collaterally before the Ninth Circuit.

It is of equal importance to note that the United States was not a party in the trial court or to the appeal before the Ninth Circuit.

The difficulty with Question II presented by Petitioners is that it was not decided by the Ninth Circuit and therefore is not an issue presently appropriate for review. That issue was specifically and expressly reserved by the Ninth Circuit as a matter unneccessary to address in light of its holding.[4]

The Ninth Circuit remanded to the District Court the issue of the present status of Arizona's disclaimer clause. Only by allowing the District Court to decide whether Arizona has repealed its constitutional disclaimer will it be certain that a conflict in result exists between the Courts. The general rule applied in such a circumstance is to refrain from reviewing issues expressly reserved by the Court of Appeals.[5]

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[4] See San Carlos, Pet. App. A-10

[5] See, e.g., Costle v. Pacific Legal Foundation, 445 U.S. 198, 218 (1980); Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979); Davis v. Passman, 442 U.S. 228, 235 n.11 (1979); Chrysler Corp. v. Brown, 441 U.S. 281, 318-319 (1979); Rosenberg v. Yee Chien Woo, 402 U.S. 49, 50 (1971); Willingham v. Morgan, 395 U.S. 402, 410 (1969).

II. GENERAL RESPONSE TO PETITIONERS' "STATEMENT OF THE CASE"

Petitioners have included "argument" in the Statement of the Case. They use terms such as "general adjudication", "comprehensive river system adjudication", "process was served", "refinement of statutory general stream adjudication". Whether the procedures were or have become "adjudications"; whether the proceedings were or have become "comprehensive river system adjudications", whether they were or have become "general adjudications" and whether "process was or has been served" are among the many issues raised by the Respondents in the trial court and before the Ninth Circuit. These are among the many issues not reached by the Ninth Circuit[6] and should not be presumed as "fact" properly before this Court. The Petitioners also mistake the San Carlos holding by suggesting it held

> "...that notwithstanding the McCarran Amendment, the Arizona state courts lack jurisdiction to determine water rights held by the United States on behalf of its Indian wards." Petition, at 11.

The precise language of the Court is " . . .that Arizona

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[6] See e.g. San Carlos, Pet. App. A-11.

has disclaimed jurisdiction over Indian lands. . ." San Carlos, PB, A-9, and the Court then adopted the reasoning and analysis in "Adsit". The language of Petitioner's suggested holding appears in neither San Carlos nor Adsit. In light of the structure of the "Issues on Appeal" as set forth by the Ninth Circuit in San Carlos, the Petitioner's holding is much too narrow.

III. THE NINTH CIRCUIT DECISIONS ARE CONSISTENT WITH THE DECISIONS OF THIS COURT

A. The Ninth Circuit decisions are consistent with this Court's interpretation of the McCarran Amendment

The Ninth Circuit decisions are fully consistent with this Court's previous interpretations of the McCarran Amendment in Colorado River Water Conservation Dist. v. United States, 424 US 800 (1976) (Akin).

Throughout their petition, Petitioners improperly characterize the McCarran Amendment as a "grant" of state court subject matter jurisdiction. The McCarran Amendment does not grant subject matter jurisdiction to courts in disclaimer states. The Amendment merely waives the sovereign immunity of the United States,[7] making the federal government "subject

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[7] United States v. District Court for Eagle County, 401 U.S. (Cont'd)

to the judgments, orders, and decrees of the court having jurisdiction". 43 USC §666(a). (emphasis added). In Re Green River Drainage Area 147 F.Supp. 127, 134 (D.C. Utah 1956). The McCarran Amendment's waiver of sovereign immunity may be likened to a consent to personal jurisdiction over the United States. Petitioners confuse the Amendment's waiver of immunity or consent to personal jurisdiction over the United States with a grant of subject matter jurisdiction.[8] The necessary distinction between the two was properly drawn by the Ninth Circuit which correctly held that the McCarran Amendment is of no aid to a state court that does not otherwise have subject matter jurisdiction to adjudicate Tribal water rights.

520, 525 (1971); United States v. District Court for Water Div. 5, 401 U.S. 527, 529 (1971).

[8] This Court has made it clear that even a grant of jurisdiction to a court does not create a cause of action or a substantive right enforceable against the United States. United States v. Testan, 424 U.S. 392, 398 (1976); United States v. Mitchell, 100 S. Ct. Rptr., 1349, (1980). And, even where a statute is created by Congress which specifically permits the condemnation of Indian alloted lands for "...any purpose under the laws of the State...," it nevertheless does not constitute a grant of subject matter jurisdiction to state courts or a waiver of sovereign immunity of the United States even though the United States would be an indispensible party. Minnesota v. United States, 305 U.S. 382, 389 (1939). See also United States v. Clarke, 445 U.S. 253, 254 (1980) (citing Minnesota v. United States with approval).

> "A valid exercise of state jurisdiction requires that the State have both personal and subject matter jurisdiction. Via the McCarran Amendment, the United States has waived sovereign immunity from suit in certain cases involving water rights. . .. However, whenever a state has chosen to disclaim subject matter jurisdiction over Indian water rights, the combination of jurisdictional prerequisites necessary for a state court to hear a challenge to Indian water rights would appear to be lacking."

Adsit, Pet. App. C-7.[9]

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[9] In matters relating to Tribal Reservation Indian affairs courts have only that jurisdiction bestowed by the Constitution or Congressional grant consistent with the Constitution.

To be sure, Congress may grant federal courts jurisdiction and may authorize certain governments, including states, to permit their courts to assume jurisdiction. When Congress so acts it provides when such jurisdiction shall be exclusive, concurrent or require the consent of the Tribe.

Thus, where Congress has intended to grant any court jurisdiction over Indian matters, it has done so expressly. See e.g., 28 U.S.C. §1362 (suits by Tribes in Federal Court); 18 U.S.C. §1152 (criminal jurisdiction in federal court for crimes by or against Indians within Indian country); 18 U.S.C. §1162 (jurisdiction to certain states except for certain Indian Reservations).

When Congress has merely authorized the assumption of jurisdiction by states, which is distinct from a grant, it has done so expressly. See, 28 U.S.C. §1360 and 25 U.S.C. §1321, 1322 (authority from Congress for states to assume civil and criminal jurisdiction over Indians on reservations only with the Tribes' permission).

See, 25 C.F.R. 11.2(b) (provides for concurrent jurisdiction of State, Federal and Courts of Indian Offenses in certain instances). See also, Indian Child Welfare Act, 25 U.S.C. §1901, et seq. (providing that jurisdiction over the adoption and foster care of Indian children shall be exclusive in Tribal Court unless waived, even though the child may have originally come into the custody of a State agency or court).

Petitioners argue that the decisions of the Ninth Circuit "contradict" this Court's interpretation of the McCarran Amendment set forth in Akin because the Ninth Circuit "carved out a debilitating exception to McCarran's grant of jurisdiction". Petition, 12-14. Petitioners, however, utterly fail to specify or discuss in their petition any alleged contradiction between the Ninth Circuit decision and Akin. Their failure is due to the simple fact that the cases are consistent.[10]

In San Carlos the Ninth Circuit determined that Arizona state courts lacked subject matter jurisdiction to challenge tribal water rights because Arizona had formally agreed, as a condition to its admission to the Union, to "forever disclaim all right and title. . .to all lands lying within said boundaries own-

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[10] In a futile attempt to draw some contradiction, Petitioners assert that the Ninth Circuit was 'apparently unaware' that in Akin this Court was presented with and refused to accept "identical" disclaimer arguments made in the amicus curiae brief of the Southern Ute Tribe. This is incorrect.

Akin did not present identical disclaimer arguments because Colorado does not have a constitutional disclaimer over Indian lands, identical, similar or otherwise. See San Carlos, Pet. App. A-8 n.5. In fact, the only mention of Indians in Colorado's Enabling Act or constitution is the provision in the Enabling Act that states: "The Constitution shall be republican in form and make no distinction in political rights on account of race or color, except Indians not taxed. . ." 18 Stat. 474. The Petitioners alleged "contradiction" simply does not exist.

ed or held by any Indian or Indian tribes" and further, that such land shall "remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. . ." Ariz. Const. Art. XX §Fourth; Act June 20, 1919, c. 310, 36 Stat. 557, 568-79, §20 (emphasis added).

After fully analyzing the factual background of Akin, the Ninth Circuit discerned that the San Carlos and Adsit cases "raise[ ] a question not at issue in Akin".

> "In a state which, unlike Colorado, expressly disclaims jurisdiction over Indian lands within its constitution and enabling act, does the McCarran Amendment grant jurisdiction and thereby repeal the disclaimers?"

Adsit, Pet. App. C-5; See San Carlos, Pet. App. A-8, n.5. The holding by the Ninth Circuit that the McCarran Amendment " . . .cannot be read to amend a state constitution disclaiming subject matter jurisdiction over such matters . . ." does not, therefore, conflict with Akin as Petitioners charge.

B. The Ninth Circuit decisions are consistent with this Court's interpretation of the Western disclaimer provisions.

Petitioners next argue that the Ninth Circuit erred in holding that the Arizona constitutional disclaimer precludes the state from asserting subject matter jurisdiction over tribal

property rights on the reservation. However, like the Tenth Circuit in Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir.), cert. denied., 444 U.S. 995 (1979), Petitioners ignore the fact that this Court has never held that States could exercise jurisdiction over or regulate Indian Tribes or Tribal property on Indian reservations.[11] The critical distinction this Court has consistently drawn is between the limited power of a state to regulate non-Indians on the reservation or Indians and property belonging to Indians off the reservation, on one hand; and on other hand, the lack of state power to regulate Indians and Indian Tribes and Tribal or Indian property on Indian reservations.

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[11] Indeed, Arizona continues to ignore the teachings of this Court. In McClanahan v. State Tax Commissioner, 484 P2d 221, 223 (1971), the Arizona Court of Appeals held ". . . that the State could impose a tax on the Navajo Reservation if the tax did not infringe on the right of the Tribe to be self-governing." This Court reversed, McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973) stating:

> "[Arizona] cites us no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed. On the contrary, this Court expressly rejected such a position only two years ago." Id. at 180.

Thus, the Ninth Circuit honored this Court's ruling in McClanahan that Arizona ". . .is totally lacking in jurisdiction over both the people and the [Navajo] lands it seeks to tax." Id. at 181.

Petitioners charge that the Ninth Circuit interpreted the disclaimer's "absolute jurisdiction and control" language as meaning exclusive Federal jurisdiction, an interpretation they say was rejected in Organized Village of Kake v. Egan, 369 U.S. 60 (1962) ("Kake"). This charge is without merit. First, this Court in Kake stated the cases of Draper v. United States, 164 U.S. 240 (1896) (state juurisdiction over non-Indians on reservation) and Williams v. Lee, 358 U.S. 217 (1959) (no state jurisdiction over reservation Indians), "indicate that 'absolute' federal jurisdiction is not invariably exclusive jurisdiction." Id. at 68. (emphasis added). Secondly, the Ninth Circuit did not hold that "absolute" meant "exclusive" or that the disclaimer barred concurrent state jurisdiction in all situations. The Ninth Circuit held that as a result of Arizona's disclaimer, Arizona had no jurisdiction to adjudicate title to Tribal property situated within the boundaries of a reservation homeland, in the absence of a valid repeal.

Contrary to the Petitioner's claims, this holding by the Ninth Circuit does not conflict with Kake's interpretation of Alaska's disclaimer and is fully consistent with this Court's prior interpretations of both Alaska's and Arizona's constitutional disclaimers.[12]

The issue in Kake was whether the disclaimer in the

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[12] This Court discussed the effect of Arizona's Constitutional Disclaimer in McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973): "Arizona, of course, has neither amended its constitution to permit taxation of the Navajos, nor secured the consent of the Indians affected." Id. at 178. Recently, in Washington v. Confederated Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979), this Court referred to Congressional policy confirming Arizona's disclaimer of jurisdiction.

> "See H. R. Rep. No. 848, 83rd Cong.,1st Sess. (1953). According to this report accompanying H.R. 1063 (the House version of Pub. L. 280) '[e]xamination of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington.' H.R. Rep. No. 848, at 6." Id. at 481, n. 25. (Emphasis added)

Further discussing Arizona's disclaimer this Court noted:

> "...Two of our other cases involving Pub. L. 280 also illustrate the need for responsible action under the federal statute. In Williams v. Lee, 358 U.S. 217, we held that the State of Arizona—one of the disclaimer States—could not validly exercise jurisdiction over a civil action brought by a non-Indian against an Indian for a transaction that occurred on the Navajo Reservation. We relied on the traditional principle that a State may not infringe the right of reservation Indians 'to make their own laws and be ruled by them' without an express authorization by Congress. Id. at 220. In Williams, the State had not attempted to comply with §6: the state court had taken jurisdiction without state statutory or constitutional authorization. A similar situation obtained in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164. There we held that Arizona could not by simple legislative

(Cont'd)

Alaska Statehood Act, §4, 72 Stat. 339 (1959), prevented the State from enforcing its fish-trap conservation laws in Alaskan waters against members of two Tribes; Tribes which had no reservations. After reviewing the unique history of the Alaska Indians[13] and the legislative debate surrounding the Act in Hearings Before Senate Committee on Interior and Insular Affairs on S. 50, 83rd Cong. Sess., (1954), this Court held that the disclaimer did not prevent Alaska from regulating such non-reservation activities.

The dispositive issue for the Ninth Circuit in San Carlos was whether the constitutional disclaimers preclude Arizona from asserting personal jurisdiction directly over a federally recognized Indian Tribe and the United States as its Trustee and subject matter jurisdiction over Tribal property rights in waters running on Tribal homelands, located within a Reservation established for the Tribes' exclusive use and occupancy, as promised by Federal Treaty.[14] Kake is not controlling on this

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enactment tax income earned by a Navajo from reservation sources. The tax statute at issue was not framed as a measure obligating the State to assume responsibility under Pub. L. 280." Id. at 486, n. 30.

[13] See general discussion of Alaskan Tribes in Part IV, Section B., infra.

(Cont'd)

issue. As this Court emphasized:

> "Even where reserved by Federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, Ward v. Race Horse, 163 U.S. 504; Tulee v. Washington, 315 U.S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in Tulee to fishing within a reservation, Pioneer Packing Co. v. Winslow, 159 Wash. 655, 294 P. 557; Moore v. United States, 157 F.2d 760, 765 (CA. 9th Cir.). See State v. Cooney, 77 Minn. 518, 80 N.W. 696."

Kake, 369 U.S. at 75.

The importance of the on-reservation/off-reservation distinction in analyzing the authority of a disclaimer state to assert subject matter jurisdiction over Indian Tribes and Indian Reservations was stressed once again in McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973). McClanahan held that Arizona was precluded from asserting its governmental interest in levying an income tax on reservation Indians with regard to income derived wholly from reservation sources. In response to Arizona's argument that such a tax on reservation Indians was permissible under Kake as a "governmental interest", the McClanahan Court ruled that:

> "There is nothing in Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed 2d, 573,

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14 Article I, Treaty with the Apaches, July 1, 1852, 10 Stat. 979, (1853); see Appendix, page 1 attached.

> (1962) to the contrary. In Egan, we held that " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction," and that this language in federal legislation did not preclude the exercise of residual state authority. See Id. at 68, 82 S.Ct. at 567. But that holding came in the context of a decision concerning the fishing rights of non-reservation Indians. See Id. at 62, 82 S.Ct. at 564. It did not purport to provide guidelines for the exercise of State authority in areas set aside by Treaty for the exclusive use and control by Indians."

McClanahan, 411 U.S. at 175 n. 15. (emphasis in original).

Here, the State of Arizona is attempting to assert jurisdiction directly over the Tribes, the United States as their Trustee and the rights of the Tribes to property on their Reservations; Reservations established for their exclusive use within the Tribes' larger aboriginal territory. As the Ninth Circuit correctly ruled, Kake does not authorize it. McClanahan and Arizona's disclaimers prohibit it.

In Kake the Tribes had not executed a treaty reserving exclusive federal jurisdiction over their territory and no reservation was established within it. This Court thus held that state regulation of Indians fishing off the reservation did not impinge on treaty-protected reservation self-government. Kake, 369 U.S. at 75.

As in McClanahan, but in contrast to the controlling facts in Kake, the Apache Respondents here have executed a

Treaty which subjects the Tribes "exclusively" to the Federal government's jurisdiction. In 1852 President Franklin Pierce, on behalf of the United States Government, executed a Treaty with the Apache Chiefs "acting on the part of the Apache nation of Indians, situate and living within the limits of the United States." 10 Stat. 979 (1853). Article I of this Treaty states unequivocally:

> "Said nation or tribe of Indians, through their authorized Chiefs aforesaid, do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction and government of the United States of America and to its power and authority they do hereby submit". (emphasis added). (See Appendix, page 1).[15]

Since Congress has spoken so clearly in declaring that the Respondents are exclusively under the jurisdiction of the federal government, the State of Arizona upon being admitted to the Union in 1912 had no residual authority to regulate the on-reservation activities of the Tribes or their Reservation property.[16]

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[15] See also, United States v. Santa Fe Pacific RR. Co., 314 U.S. 339, 346 n.4 (1941).

[16] Unlike Petitioners, who argue that cases with dissimilar facts, such as Kake and Akin, should have controlled the Ninth Circuit decisions, this Court in McClanahan was very careful to clarify previous cases where state jurisdiction was asserted (Cont'd)

The two Apache Tribes, Respondents here, raised below the issue of exclusive federal jurisdiction based upon the express language of their Treaty. Because of its holding on the disclaimer issue, however, it was unnecessary for the Ninth Circuit to reach several issues raised by the Tribes, including the controlling effect of the Treaty. Yet, the significance of the Treaty's exclusivity language cannot be overstated, for it removes from consideration any narrow interpretation of Ari-

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over reservation Indians and their property on the Reservation.

> "We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of Tribal self-government. See e.g., Organized Village of Kake v. Egan, supra; Metlakatla Indian Community v. Egan, 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed. 562 (1962); Oklahoma Tax Comm. v. United States, 319 U.S. 598, 63 Sct. 1284, 87. L.Ed. 612 (1943). Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations. See e.g., Thomas v. Gay, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898); Utah & Northern R. Co. v. Fisher, 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542 (1885). Cf. Surplus Trading Co. v. Cook, 281 U.S. 647, 651 50 S.Ct. 455, 456, 74 L.Ed. 1091 (1930). Nor, finally, is this a case where the State seeks to reach activity undertaken by reservation Indians on non-reservation lands. See e.g. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed. 2d 114. Rather, this case involves the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation."

McClanahan, 411 U.S. at 168-69.

zona's disclaimer. Here, "absolute federal jurisdiction" means "exclusive".

Petitioners charge that the Ninth Circuit should be reversed because its holding "rejects this Court's express holding in Williams v. Lee, (358 U.S. 217 (1959), that: "absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Petition 17-18.[17] This Court, however, has never held that the Williams

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[17] In support of their argument that the Williams test applies, Petitioners cite Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147-48 (1973), and Puyallup Tribe v. Washington Department of Game, 433 U.S. 165, 173 (1977).

Interestingly, the critical significance of the on-reservation/off-reservation distinction, ignored by Petitioners, was again highlighted in Mescalero. After citing McClanahan as holding that Arizona had no authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, this Court in Mescalero stated that "tribal activities conducted outside the reservation present different considerations." Mescalero, 411 U.S. at 148. Due to these different considerations, Mescalero held that New Mexico had authority to impose a non-discriminatory gross receipts tax on tribal activities off the reservation.

Here, Arizona is seeking to challenge the property rights of reservation Indians. As the McClanahan opinion noted, see footnote 16, supra, Mescalero is inapposite to situations of state regulation of reservation Indians.

Petitioners cite Puyallup as holding that: "(Washington State Court has subject matter jurisdiction to determine on-reservation treaty fishing rights of reservation Indians)." This (Cont'd)

test is to be applied where a state attempts to assert jurisdiction directly over federally recognized Tribes and their Reservation property. "Indeed, the position was expressly rejected in Williams itself. . .". McClanahan, 411 U.S. at 180.[18] Thus, notwithstanding the urgings of Petitioners, the Ninth Circuit, consistent with McClanahan, correctly ruled that Williams was not applicable, because Arizona's attempt to assert jurisdiction directly over Indian Tribes and the United States and Reservation property challenges and jeopardizes Tribal Reservation

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parenthetical statement is inaccurate and misleading. In Puyallup, Washington sought to regulate fishing activities of the Puyllaup tribe and individual tribal members. This Court held that the "portions of the state-court order that involve relief against the Tribe itself must be vacated in order to honor the Tribe's valid claim of immunity." 433 U.S. at 173. As to the individual Indian defendants, Puyallup held that Washington had authority to regulate their fishing activities. Although the Puyallup Reservation had been established by Treaty for their "exclusive use", two subsequent Acts of Congress had alienated, in fee simple absolute, all but 22 acres of the Tribe's 18,000-acre Reservation. As a result, it was "perfectly clear" that the Puyallup's treaty-right to fish in the Puyallup River was now to be exercised in common with all citizens was therefore subject to reasonable state regulation. This Court stated that its opinion did not in any way decide whether the Puyallups even had a Reservation, a matter it conceded was 'in dispute'. 433 U.S. at 173 n. 11.

In contrast to the controlling facts in Puyallup, the Reservations in Arizona remain the exclusive homeland of each of the Respondents.

[18] See note 11, supra.

property rights. As was emphasized in McClanahan, where Arizona was attempting to assert jurisdiction over tribal property rights within the reservation, "[W]e reject the suggestion that the Williams test was meant to apply in this situation. It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians." McClanahan, 411 U.S. at 180.[19]

The holding in Kake that Alaska in its Statehood Act disclaimed only 'proprietary interests' in Indian lands, not

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[19] Under Williams, then, State law applies to non-Indians engaged in activities on Indian reservations unless that specific application of state law is preempted by federal law or would violate the Tribe's right of self-government. See e.g., Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)(State tax on cigarette purchases by non-Indians on reservation); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976)(same); New York ex rel Ray v. Martin, 326 U.S. 496 (1946)(murder of non-Indian by non-Indian on reservation); Draper v. United States, 164 U.S. 240 (1896)(same); Thomas v. Gay, 169 U.S. 264 (1898)(tax on cattle of non-Indian lessees of reservation land); White Mountain Apache Tribe v. Arizona, 649 F2d 1274 (9th Cir. 1981)(tax on reservation hunting by non-Indians). See, Bryan v. Itasca County, 426 U.S. 128, 129 n.2 (1976) (noting the general inapplicability of the Williams pre-emption test to resolution of jurisdiction questions concerning Tribal property within Indian reservations).

Assuming, arguendo that the Williams test applies here, the 1852 Apache Treaty, Arizona's Enabling Act and Public Law 280 are the "governing acts of Congress" precluding Arizona's assertion of subject matter jurisdiction over Indian Tribes and Indian property on the reservation.

'governmental interests', is often cited as controlling the construction of other disclaimers. However, Respondents here are not aware of a single opinion that analyzes the meaning of the words "proprietary" and "governmental" or whether a given state action must be either one or the other, or whether an action can be both proprietary and governmental.[20]

In discussing non-Alaska disclaimers, courts cite Kake with no independent research of the legislative history of the actual state disclaimer in question. They summarily assume that since the asserted state jurisdiction is one normally undertaken by state governments, it is permissible under Kake as a "governmental interest".[21]

In like manner, Petitioners rebuke the Ninth Circuit for

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[20] In its Brief below, the Tribe argued that even if this vague and undeveloped concept of "governmental" vs. "proprietary" interests were applicable, the State of Arizona is asserting a proprietary interest in water through State statutes which claim for the State any unappropriated water.

[21] For example, in Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014, (1976), upon which the 10th Circuit relied in Jicarilla v. United States, the New Mexico court did not attempt to discern the meaning of the New Mexico disclaimer enacted over 40 years before passage of the Alaskan Statehood Act. Rather, the court summarily concluded: "The State is not asserting a proprietary interest in Indian lands, See Kake Village v. Egan, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed. 2d 573 (1962)."

failing to apply Kake and a claimed distinction of "governmental" vs. "proprietary" interests to hold that Arizona's assertion of subject matter jurisdiction over reservation Indian property rights is permissible when labeled an assertion of "governmental interest." They claim that the Arizona state court is "only providing the comprehensive procedural framework," and that the "State's paramount interest is its governmental interest in securing a comprehensive adjudication" of water rights. Petition, 17-19. The Tribes have governmental interests to the contrary.

The Ninth Circuit correctly declined to accept Petitioner's claims. The court recognized that whatever label or name Arizona and the other Petitioners use to characterize the State's action, the assertion of subject matter jurisdiction by Arizona here would directly challenge and jeopardize on-reservation property rights. Other than the cases arising in New Mexico, Reynolds v. Lewis[22] and Jicarilla, no court has ruled that a disclaimer state's alleged "governmental interest" in "providing a forum" is a sufficient reason to side-step express provisions found in a Federal Treaty, the Federal Enabl-

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[22] 88 N.M. 636, 545 P2d 1014 (1976).

ing Act and the State's Constitution.

In Williams v. Lee this Court held that it was unlawful for Arizona to assert jurisdiction over a reservation Indian by providing a forum to adjudicate a claim by a non-Indian. In Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976), a paternity action filed by the State of Arizona, the Arizona Supreme Court held that Arizona had no authority to serve process on a Papago Indian within the reservation because the Papago Reservation was reserved for the exclusive use of the Papago and Arizona had not amended its constitutional disclaimer. The State's "governmental" interest in providing a forum was insufficient to overcome this jurisdictional barrier. In Kennerly v. District Court of Montana, 440 U.S. 423 (1971), this Court reaffirmed Williams v. Lee and held that Montana had no jurisdiction to provide a forum for a suit against reservation Indians on a debt arising within the reservation. In Chino v. Chino, 90 N.M. 204, 561 P.2d 476 (1977), the New Mexico Supreme Court departed from its earlier holding in Reynolds and held that the State of New Mexico had no jurisdiction to provide a forum and assert subject matter jurisdiction in a forcible detainer action against a reservation Indian. The New Mexico court recognized that the 1852 Apache Treaty, the New Mexico disclaimer,

and the fact that New Mexico had declined to repeal its disclaimer and assume jurisdiction over reservations under Public Law 280, combined to pre-empt the State's assertion of jurisdiction. Notwithstanding the State's interest in providing a forum, the New Mexico court stated that the action would necessitate a direct adjudication of the property rights of Indians within the reservation. Finally, in McClanahan this court held that it was unlawful for Arizona to assert jurisdiction over the Navajo Reservation in the form of an income tax on reservation Indians with respect to income derived from reservation sources. Yet no one disputed that Arizona had a governmental interest in levying such a tax.

These cases and others cited above clearly indicate that the proper focus of inquiry is not to pigeonhole the State's action as either "proprietary" or "governmental". Rather, the inquiry is whether Arizona has the authority to exercise jurisdiction directly over the Tribes and their property, in the absence of a clear congressional grant of authority and express repeal of the Apache Treaty and a valid repeal of the state's constitutional disclaimers. Here, the state's attempted assertion of jurisdiction is unauthorized under the law because it directly affects Indians, Indian Tribes and Tribal property on the

reservation not Indians off the reservation.

Consistent with the decisions of this Court, the Ninth Circuit in Adsit concluded that Jicarilla erroneously ignored the necessary distinction between regulation of Indians off the reservation and non-Indians on the reservation, and regulation of Indians on the reservation. After reviewing Kake and White Mountain Apache Tribe v Arizona,[23] the Ninth Circuit stated:

> "All that the latter two cases recognize is that a State may have a strong governmental interest that empowers it to regulate certain limited conduct concerning non-reservation Indians or non-Indians on reservations. . . The power of a court in a disclaimer State to enforce a regulatory statute that may adversely affect Indians falls far short of the power to adjudicate a direct challenge to Indian water rights in and to the waters of streams. A disclaimer State cannot assert jurisdiction over such matters until Indian's sovereign immunity has been waived and the state has repealed its disclaimer. Unless the State effectively repeals its disclaimer, it cannot hear this matter."

Adsit, Pet. App. C-11.

IV. THE NINTH CIRCUIT'S REMAND TO DETERMINE WHETHER ARIZONA REPEALED ITS CONSTITUTIONAL DISCLAIMER IS CORRECT AND MAKES REVIEW BY THIS COURT UNNECESSARY

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[23] 649 F.2d 1274 (9th Cir. 1981) (holding that Arizona could impose hunting license fees on non-Indians on the Reservation).

A. The Ninth Circuit correctly remanded the case to determine whether Arizona has repealed its disclaimer.

This Court has long held that disclaimers literally preserved federal "jurisdiction and control" over federal Indian reservations. See United States v. Sutton, 215 U.S. 291, 295-296 (1909).

Having determined that Arizona's constitutional disclaimer precludes an assertion of subject matter jurisdiction over a Tribe's reservation property, the Ninth Circuit remanded San Carlos. On remand the district court is directed to "determine if Arizona has properly asserted jurisdiction pursuant to P.L. 280." San Carlos Pet. App. A11.

Petitioners challenge the Ninth Circuit's decision because "P.L. 83-280, by its very terms, is not even applicable to adjudications of water rights." Petition at 21. They therefore claim it was error for the Ninth Circuit to consider P.L. 280 at all in deciding the disclaimer issue.

It was not error. P.L. 280 effected an immediate cession of civil and criminal jurisdiction over Indian country to five States. To the remaining States it gave an option to assume jurisdiction over causes of action against Indians. Realizing that certain western states had constitutions or statutes

containing organic law disclaimers which retained exclusive federal jurisdiction, Congress consented to the amendment of the state constitutional disclaimers to remove any legal impediment to the assumption of jurisdiction under the Act.[24] 25 U.S.C. §1324 (67 Stat. 588, §6).

The history and purpose of P.L. 280 is set forth in H. Rep. No. 848, 83d Cong., 1st Sess. (1953), reprinted in [1953] U.S. Code Cong. & Admin. News at 2409. The House report states that examination of the disclaimers revealed that the

> "[E]ffect of the disclaimer of jurisdiction over Indian land within the borders of these States - in the absence of consent being given for future action to assume jurisdiction - is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the Bill as reported, proceed to amendment of their respective organic laws by proper amending procedure."

Id at 2412 (emphasis added).

In 1968 Congress amended P.L. 280 to provide "that States that have not extended criminal or civil jurisdiction to

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[24] Under the Enabling Acts, disclaimer states were prohibited from amending their disclaimer provisions without the express consent of Congress. See e.g., Act June 20, 1910, c. 310, 36 Stat. 557, 568-579, at §20, which precluded Arizona from "making any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress." See also, Ariz. Const. Art. XX, Preamble.

Indian country can make future extensions only with the consent of the Tribes affected." Washington v. Yakima, 439 U.S. at 494, n. 40. See 25 U.S.C. §§1321(a), 1322(a). Thus, today the consent of the affected Tribes must be given before a State may repeal its disclaimer.

Congress understood that unless the disclaimers were repealed it would not be possible for disclaimer states to assume jurisdiction over suits against Indians. It therefore follows, as the Ninth Circuit determined, that if a disclaimer state did properly assume subject matter jurisdiction under P.L. 280, it necessarily would mean that it had repealed its constitutional disclaimer.

In both P.L. 280 and the 1968 Civil Rights Act, Congress specifically reserved from the authorization to the states, the right to adjudicate or affect the desposition of Indian water rights. Contrary to the assertions of Petitioners, the Ninth Circuit was fully aware that assumption of civil jurisdiction under P.L. 280 would not empower a State to adjudicate Tribal water rights due to the exclusion contained in 25 U.S.C. §1322(b). Adsit, Pet. App. C-3 and C-4. The Court stated that it was remanding San Carlos to determine if Arizona had assumed jurisdiction "under P.L. 280" not because such an assum-

ption, standing alone, would authorize the adjudication of water rights, but because such an assumption would necessarily mean that the Arizona constitutional disclaimer had been validly repealed at some time. As the Ninth Circuit held, "[t]he appearance that subject matter jurisdiction is lacking in a State court in a disclaimer State would only be defeated by a finding that the disclaimer had been validly repealed." Adsit, Pet. App. C-8. (emphasis added).

Since under the Constitution of some States, action by the legislature may be sufficient to amend the State's constitution,[25] the Ninth Circuit in Adsit stated that

> "A court must first determine whether [the State's water adjudication statute] acts as a legislative repeal of the Constitutional disclaimer of jurisdiction. Washington v. Yakima. Second, it must determine whether such a repeal required Tribal consent as provided in the 1968 amendment to P.L. 280. Only if the . . . legislation is determined to constitute a legislative repeal within the requirements of the Federal law will the McCarran Amendments grant of personal jurisdiction over the United States, acting as trustee for Indian water rights, furnish the State court with the requisite personal and subject matter jurisdiction. Only if a legislative repeal is found and the State has subject matter jurisdiction need one consult the waiver of immunity provisions of the McCarran Amendment and consequently the terms of

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25 See, Washington v. Yakima, 439 U.S. at 493. See also, State v. Paul, 53 Wash. 2d 789, 337 P.2d 33 (1959).

the Akin."

Adsit, Pet. App. C-8.

The Ninth Circuit was correct. Until a valid repeal is effected, a disclaimer state does not have the requisite subject matter jurisdiction over Indian Tribes and their Reservation property.

B. The Ninth Circuit's Remand of San Carlos makes review by this Court unnecessary.

The Ninth Circuit decisions accurately interpret applicable law. Arizona's constitutional disclaimer over Indian Reservations precludes it from asserting subject matter jurisdiction over Indian Tribes on Reservations and their property. The McCarran Amendment waived the sovereign immunity of the United States but did not grant disclaimer State's subject matter jurisdiction to adjudicate a Tribe's right to waters on the Reservation.

For disclaimer states to properly attempt to assume and assert subject matter jurisdiction over reservation water rights they must first amend their constitutional disclaimers. If a state constitution so provides, such a repeal may be accomplished by legislative action. San Carlos was remanded to determine whether Arizona had repealed its constitutional disclaim-

er over Indians on the Reservation.

If the district court on remand finds that Arizona's disclaimer has in fact been validly repealed, the result will be consistent with that reached in Jicarilla - that the disclaimer is no bar to the assertion of subject matter jurisdiction over reservation water rights. Subject to other claimed jurisdictional defects, the district court would then be in a position, having found concurrent subject matter jurisdiction, to apply Akin and determine whether the doctrine of "wise judicial administration" warrants dismissal of the federal actions. Were the district court to determine that the Arizona disclaimer has not been amended, that finding could be appealed if Petitioners so desired.

Thus, this matter and its related issues are not ripe for review. It is premature for this Court to grant the petition at this early stage in the proceedings since it may develop that no real conflict in result exists between the Ninth and Tenth Circuits. Moreover, this Court should decline granting the petition because the Ninth Circuit had no occasion to rule upon many of the substantive issues of the respondents. The Court's finding that Arizona's disclaimer effectively bars the assertion of subject matter jurisdiction over reservation Indians made it

"unnecessary to reach any other issues," including whether dismissal under the Akin factors would have been proper, the effect of the 1852 Apache Treaty in which the Apaches and the United States agreed that the Apaches would be "exclusively under the laws, jurisdiction, and government of the United States", and issues concerning the inadequacy of the statute including the adjudication of groundwater claims, and service of process, damage actions and sovereign immunity, among others. See San Carlos, Pet.App. A-10, A-11.

Petitioners argue that the Ninth Circuit's interpretation of Arizona's disclaimer appears to conflict with Jicarilla's interpretation of the New Mexico disclaimer and that this warrants review. Petitioners overlook the fact that the Tenth Circuit relied on Kake, which in turn relied on the legislative history of the Alaska Statehood Act[26]. An interpretation of Congressional intent in passing a disclaimer provision for Arizona, a state with a history of warring Tribes, cannot be blindly applied to one enacted for Alaska some 50 years later. This Court in Kake recognized the distinction.

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[26] It is significant in this regard to note that the Tenth Circuit in Jicarilla characterized its research surrounding disclaimers in different states as "limited". 601 F2d 1116 at 1129.

Aside from the obvious differences in time of passage, the Western disclaimers vary in wording, as does the history of each Indian Tribe and legal status of each Tribe. The history of Congressional legislative action for each of the Western disclaimers being different, a construction of legislative intent placed on one disclaimer should not be uprooted and transferred to another disclaimer that has a different factual setting.

One need only compare the situation in Kake to that present here. The two tribes in Kake did not reserve Reservations for themselves within their aboriginal territory, nor did the United States establish a reservation for them. Each of the Respondents in San Carlos has a permanent Tribal homeland reserved for their exclusive use within their larger aboriginal territories. The Alaskan Indians were never in the hostile and isolated position of the Arizona Tribes. Thus, unlike Arizona, there were never Treaty Indians in Alaska, and the United States made no attempt to "isolate from settlers" the Alaskan Tribes. Metlakatla Indian v. Egan, 369 U.S. 45, 51 (1962). For many years prior to Alaskan statehood, Indians in Alaska had substantially adopted and been accepted by the civilization in the territory. Justice Frankfurter recognized another important difference between Alaskan Tribes and other

native Americans that was a necessary consequence of such vast contrasts in historical development. That difference is that Alaskan Tribes are denied the protection of Indian sovereign immunity enunciated in Worcester v. Georgia, 6 Pet. 515 (1832). Id. at 51.

Perhaps the most important reason why Western disclaimers should be interpreted on a state-by-state basis is made clear from a close reading of Kake. To determine the meaning of Section 4 of the Alaska Statehood Act, this Court in Kake discerned the legislative intent behind that section, "in light of the circumstances of its formulation and enactment," circumstances vastly different from those surrounding passage of Arizona's disclaimer a half century earlier. Kake 369 U.S. at 65. The Kake opinion reveals that the single source of authority for this court's interpretation of the Alaska disclaimer was the Senate Committee Hearings on the Alaska Statehood Act. 369 U.S. at 69-71.

The Hearings cited by the Court indicated that two Senators "expressed the clear desire that federal jurisdiction not be made exclusive over all disclaimed areas" in Alaska. This Court quoted Senator Jackson as saying: "All that you are doing here [in the Alaska Statehood Act] is a disclaimer of pro-

prietary interests," and Senator Cordon as saying:

> "The act of admission gives to the State of Alaska political jurisdiction, including all that is meant by the term 'police power' within its boundaries unless there be expressed or definitely implied, which is the same thing, a reservation of exclusive jurisdiction in the United States." (emphasis added).

Kake, 369 U.S. at 69. The United States did not reserve for the Village of Kake a reservation Tribal homeland, nor did the Village execute a Treaty with the United States which provided for exclusive federal jurisdiction. In contrast, the Respondents here have Reservations that were to be expressly defined for their exclusive use under treaties which recited exclusive federal jurisdiction. Moreover, the Reservations were established within the exterior boundaries of the Tribes' aboriginal territory and their ancient homeland.

The above discussion points out that a construction of one disclaimer should not be blindly transferred to that of another. Although the New Mexico and Arizona Enabling Acts were embodied in different parts of the same Congressional Act, the Tenth Circuit in Jicarilla completely neglected an independent analysis of the legislative history of that Act or of the history of New Mexico Indians. On the contrary, the Ninth Circuit had the issues briefed, and had the Apache and Navajo

Treaties and this Court's discussion in McClanahan, to guide it in its decision regarding the Arizona disclaimer.

V. THE DECISIONS BELOW DO NOT FRUSTRATE STATE STREAM ADMINISTRATIVE EFFORTS

The states can adjudicate and administer all private and state water rights. Petitioners confuse the distinction between a desire of the State to control the determination of all rights with the more reasonable position which would provide the State with the information concerning the priority date and quantity of Federally reserved water rights and water reserved by or for Indian Tribes.

In urging their position the Petitioners overlook the fact that the Federal Court in fact has jurisdiction to hear the Indian and federal cases and that such cases are presently pending there for many Tribes. They also overlook the fact that the statutory framework of Arizona allows for incorporation of other judicial determinations.[27] Finally, the State position mistakenly assumes that both state adjudication and administration of Indian water rights is required for the State of Arizona to fulfill its goal of providing certainty of all rights to

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[27] A.R.S. §45-257(B)

water in the subject watershed. The State and other Petitioners have gone to great lengths filing multiple motions to dismiss in all Indian water cases which have been served in Arizona, thus frustrating efforts by the Tribes which would have resulted in the certainty desired.

The Tribes can pursue the adjudication of their rights in federal court. These adjudications will raise issues of paramount importance to the Tribe which have never been determined in any court including: A) the purposes for which the reservations were established; B) the quantity of water needed to satisfy the present and future purposes; C) the quantity of water reserved by the Tribe to itself and the aboriginal claims of the Tribes to water; and D) the claims of the Tribe based upon international law, including the law of Spain and Mexico.

Claims of the Tribes to water based upon aboriginal title and international law are most significant. These represent Tribal claims to water never reserved by the United States and never ceded by the Tribes United States v. Winans, 198 U.S. 371 (1905); Skeen v. United States, 273 F. 93 (9th Cir. 1921).[28] Thus, the only party who could assert these rights are

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[28] See also, United States v. Santa Fe Pacific RR. Co., 314 (Cont'd)

the Tribes and not the United States in its trustee capacity.[29] This Court recognized the potential for just such a situation when it reserved in Akin the question of whether an action brought by a private party would be treated differently. Akin at 820, n. 26.

Such a determination procedure is not "piecemeal adjudication" since the same separate determination would be required in the state proceeding. Indeed the adjudication of the Tribal water rights in Federal court will expedite the State's adjudication program by allowing the Tribal adjudications in the federal courts, which have always been the court of preference, and the state adjudications to proceed simultaneously.

Such a determination does not interfere with State proceedings which are of inter sese nature since the Tribes' rights are premised upon entirely different legal grounds. This dis-

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U.S. 339 (1941).

[29] These arguments raised by the Tribes below were not decided by the Ninth Circuit due to its threshold determination of the question of the disclaimer. The presence of rights to water inherent in the Tribe and never ceded to the United States and therefore assertable only by the Tribe only serves to underscore the importance of separate treatment of tribal water rights.

tinction has been noted by members of this Court in a dissenting opinion in Akin:

> When a priority is established, the holders' right to take a certain amount of water and his seniority (date) of his priority is established. That determination does not affect and is not affected by the establishment of other priorities. Id. at 825 n.7. (Stewart J., Dissenting).

The claims of Indian Tribes will require a wholly dissimilar procedure and focus of investigation than that applied to determine state claims. Yet, the same procedure under the Winter's Doctrine is required to determine Tribal claims whether the determination is made in federal court or state court. Once determined in a federal court, Tribal water rights would be incorporated into the ongoing tabulation of state claims.

Simply stated, the only thing that the State of Arizona needs from the Indian Tribes or the Federal government is the priority and the quantity of water to which the Tribes are entitled. This is exactly what will be provided through pending Tribal adjudications in Federal court.[30]

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[30] San Carlos Apache Tribe, Payson Community of Yavapai-Apache, Fort McDowell Community of Mohave Apache; Salt River Community of Pima-Maricopa Indians; and Gila River Indian Community. Petitioners also attack the nature of the (Cont'd)

Petitioners cite the dissenting opinion in San Carlos, claiming that no adjudication will take place because an adjudication depends upon the cooperation of the United States and the sovereign immunity of the Tribes on the watershed will prevent suit.

It is true that the sovereign immunity of the Tribes prevents suit. It is also true that any adjudication depends upon the cooperation of the United States. That no adjudications will take place is incorrect. Since many of the Indians Tribes on the watershed are already present in Federal District Court seeking adjudications, the fact of sovereign immunity of the Tribes is moot in those cases. Concerning the question of the participating by the United States, voluntary or otherwise, Petitioners cannot cite a single fact in support of the contention that the United States would be unwilling to join in an adjudication of Federal and Tribal water rights in Federal Court.

Tribes' adjudication (79-269 CIV PHX VAC) claiming that the considerations of the Akin opinion are not applicable. Petition 22-24. This position is exactly the opposite of the argument urged below: that the Tribes' original Complaint should be dismissed on the grounds of the Akin opinion.

VI. CONCLUSION

The decisions of the Ninth Circuit are correct. This Court should decline to accept review of these cases for that reason. Moreover, review at this stage, because of the potential of conflict between the Circuits is premature since the results of a remand and subsequent appeal are unknown. Review at this time is also untimely since the Ninth Circuit has not ruled upon many of the substantive issues of the Respondents. The effect of decisions of the Ninth Circuit does not paralyze the State of Arizona's stream adjudication of private and State water rights in State Court. Tribal rights determined in Federal Court with subsequent decrees incorporated by the State Court, provides the State with adequate information to allow management of its water resources.

For the above reason, this Court should deny the Petition for Certiorari.

RESPECTFULLY SUBMITTED this 20th day of August, 1982.

SPARKS & SHLER, P.C.
Joe P. Sparks

APPENDIX

TREATY WITH THE APACHES. July 1, 1852

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

TO ALL AND SINGULAR TO WHOM
THESE PRESENTS SHALL COME, GREETING:

Whereas a Treaty was made and concluded at Santa Fe, New Mexico, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E.V. Sumner, U.S.A., commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Captain Simon, Captain Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States, which treaty is in the words following, to wit:

Articles of a Treaty made and entered into at Santa Fe, New Mexico, on the first day of July in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E.V. Sumner, U.S.A., commanding the 9 Department and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas, Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache Nation of Indians, situate and living within the limits of the United States.

ARTICLE 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

ARTICLE 2. From and after signing of this Treaty hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the government and people of the United States; the said nation, or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or powers, who may be at any time at war or enmity with the government or people of said United States.

ARTICLE 3. Said nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they may have intercourse, as well as all persons and powers, at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse.

ARTICLE 4. All said nation, or tribe of Indians, hereby bind themselves to refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes.

ARTICLE 5. Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from making any "incursions within the Territory of Mexico" of a hostile or predatory character; and that they will for the future refrain from taking and conveying into captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico; and that they will, as soon as possible after the signing of this treaty, surrender to their agent all captives now in their possession.

ARTICLE 6. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Apache Indian

or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.

ARTICLE 7. The people of the United States of America shall have free and safe pasage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

ARTICLE 8. In order to preserve tranquillity and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.

ARTICLE 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

ARTICLE 10. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper.

ARTICLE 11. This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof we the undersigned have signed this Treaty, and affixed thereunto our seals, at the City of Santa Fe, this the first day of July in the year of our Lord one thousand eight hundred and fifty-two.

WITNESSES:

F.A. CUNNINGHAM, Paymaster, U.S.A.

J.C. McFERRAN, 1st Lt. 3d Inf. Act. Ast. Adj. Gen.

CALEB SHERMAN.

FRED. SAYNTON.

CHAS. McDOUGALL, Surgeon, U.S.A.

S.M. BAIRD, Witness to the signing to Mangus Colorado.

JOHN POPE, Bvt. Capt. T.E.

E.V. SUMNER, [SEAL.], Bvt. Col. U.S.A. com'g 9th Dept. In charge of Executive Office of New Mexico.

JOHN GREINER, [SEAL], Act. Supt. Indian Affairs, New Mexico.

CAPITAN VUELTA, his X mark [SEAL.]

CUENTAS AZULES, his X mark [SEAL.]

BLANCITO ————, his X mark. [SEAL.]

NEGRITO ————, his X mark. [SEAL.]

CAPITAN SIMON, his X mark [SEAL.]

MANGUS COLORADO, his X mark [SEAL.]

AND WHEREAS the said Treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the twenty-third day of March, one thousand eight hundred and fifty-three, advise and consent to

the ratification of its articles, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION,
SENATE OF THE UNITED STATES,
MARCH 23, 1853.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the Articles of a Treaty made and entered into at Santa Fe, New Mexico, on the first day of July, in the year of our Lord, 1852, by and between Colonel E.V. Sumner, United States Army, commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States.

Attest - ASBURY DICKINS, Secretary

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the twenty-third day of March, one thousand eight hundred and fifty-three, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Done at the city of Washington, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and fifty-three, and of the Independence of the United States the seventy-seventh.

FRANKLIN PIERCE

BY THE PRESIDENT:

W.L. MARCY, Secretary of State.

§45-231. Determination of conflicting rights

A. The department may, and upon a petition signed by one or more water users upon a stream or water supply requesting the determination of the relative rights of the various claimants to the waters of that stream or supply shall, if the facts and conditions justify, determine the rights of the various claimants. The department shall fix a time for taking testimony, and shall make examinations necessary to determine such rights. If an action has been brought in a state court for determination of such rights, the court may transfer the action to the department for determination as provided in this article, but no proceedings shall be taken in such action by the department until such transfer is made.

B. When rights to the use of water or dates of appropriation have been determined in a judgment or decree of a court, the department shall accept the determination of such rights and dates of appropriation as found in the judgment or decree, and the owner of an appropriation adjudicated therein need not appear in or take notice of the proceedings, investigations or hearings of the department except to disprove abandonment or other loss of the right adjudicated by the judgment or decree. (Repealed by Laws 1979 Ch. 139, §38 eff. April 24, 1979, now found in A.R.S. §45-252.)

§45-251. Definitions

In this article, unless the context otherwise requires:

1. "General adjudication" means an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source.

2. "Person" means an individual, a partnership, a corporation, a municipal corporation, the state of Arizona or any political subdivision, the United States of America, an Indian tribe or community or any other legal entity, public or private.

3. "Potential claimant" means all persons claiming water rights or on whose behalf claims to water rights are asserted.

4. "River system and source" means all water appropriable under §45-131 and all water subject to claims based upon federal law. Added Laws 1979, Ch. 139, §39, eff. April 24, 1979; Laws 1980, 4th S.S., Ch. 1, §64, eff. June 12, 1980.

§45-252. General adjudication; representation; superior court; assignment to judge; petition

A. One or more water users upon a river system and source, the water rights of which have not been previously adjudicated under this article and administered by the director of water resources, or the state of Arizona upon the request of any state agency other than the department of water resources may file a petition to have determined in a general adjudication the nature, extent and relative priority of the water rights of all persons in the river system and source.

B. The attorney general shall represent the state of Arizona in connection with all water claims asserted by this state. The director shall be represented by legal counsel retained in accordance with §45-104, subsection G.

C. The general adjudication shall be brought and maintained in the superior court in the county in which the largest number of potential claimants resides. The clerk of the court in which the petition is filed shall notify the supreme court and the supreme court shall be responsible for assigning the general adjudication to a superior court judge and appointing a master.

D. The petition for a general adjudication shall be captioned: "In re the general adjudication of all rights to use water in the _____ river systems and source" and shall request that the court determine the nature, extent and relative priority of the water rights of all persons in the river system and source. Added Laws 1979, Ch. 139, §39, eff. April 24, 1979. As amended Laws 1980, 4th S.S., Ch. 1, §65, eff. June 12, 1980.

§45-257. Hearings, report of master; final judgment by court; administration and enforcement of decree

A. The master shall:

1. After due notice, conduct such hearings and take such testimony as shall be necessary to determine the relative water rights of each claimant.

2. Prepare and file with the court a report in accordance with rule 53(g) of the Arizona rules of civil procedure, which shall contain findings of fact and conclusions of law. Each claimant shall have the right to file with the court written objections to the master's report within one hundred eighty days of the date on which the master's report was filed with the court.

3. Maintain under his control all records and documents at such locations as may be designed by the court.

B. The court, upon review of the master's report and in accordance with rule 53 of the Arizona rules of civil procedure, shall:

1. Determine the extent and priority date of and adjudicate any interest in or right to use the water of the river system and source, provided when rights to the use of water or dates of appropriation have previously been determined in a judgment or decree of a court, the court shall accept the determination of such rights and dates of appropriation as found in the judgment or decree unless such rights have been abandoned.

2. Establish, in whatever form determined to be most appropriate by the court, one or more tabulations or lists of all water rights and their relative priorities on the river system and source.

3. Refer the final judgment or decree to the director for administration and enforcement under the continuing jurisdiction of the court.

4. Make appropriate orders to ensure that the entire

record of the general adjudication is preserved in an accessible and usable form.

5. Record a certified copy of the final judgment or decree in each county within the geographical scope of the general adjudication which shall constitute constructive notice of the contents of the judgment or decree. Added Laws 1979, Ch. 139, §39, eff. April 24, 1979. As amended Laws 1980, 4th S.S., Ch. 1 §70, eff. June 12, 1980.

§45-258. Transfer of proceedings of state land department to superior court

A. Upon the effective date of this article, the state land department shall immediately transfer all proceedings then pending under §§45-231 through 45-245 and all fees paid thereunder to the superior court in the county in which the largest number of potential claimants resides. The transfer shall be effected in the following manner:

1. The department shall file with the superior court the original petition previously filed pursuant to §45-231, subsection A, which shall then be deemed to be the petition in the general adjudication and which shall be recaptioned in accordance with §45-252, subsection D.

2. The department shall file with the superior court a certified copy of the notice mailed to all potential claimants pursuant to §45-234, which shall be adopted by the court as the summons required by §45-253, subsection A, paragraph 1.

3. The department shall file with the superior court all affidavits of publication which were obtained in connection with all publications made pursuant to §§45-232 and 45-234.

4. The department shall file with the superior court is records, together with all supporting documents, of the names and addresses of all of the known potential claimants to whom the notice and statement of claimant were mailed pursuant to §§45-234 and 45-235.

5. The department shall file with the superior court all statements of claimant which have been or are thereafter

filed with it pursuant to §45-235, which shall then be deemed to be the statements of claimant of the particular water claimant in the general adjudication. For proceedings which were commenced before the effective date of this article but for which the date for filing statements falls after the effective date of this article:

(a) The department shall continue to accept the statements of claimant but shall immediately file them with the superior court.

(b) The superior court shall, as to any filing fees paid pursuant to §45-108, subsection B, adjust the fees in accordance with the amounts of the fees set forth in §45-254, subsection F, and either reimburse the claimant or direct the claimant to pay any adjusted balance due to the superior court.

B. In this section, a reference to §§45-231 through 45-245 refers to any such section as was in effect prior to the effective date of this section. Added Laws 1979, Ch. 139, §39, eff. April 24, 1979.

(Repealed by Laws 1980, 4th S.S., Ch. 1, §71 eff. June 12, 1980).